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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,  
  
Plaintiff and Respondent,

v.

DANIEL TODD GIVENS,  
  
Defendant and Appellant.

2d Crim. No. B172260  
(Super. Ct. No. F347499)  
(San Luis Obispo County)

Daniel Todd Givens appeals the judgment and order committing him to the California Department of Mental Health for treatment as a mentally disordered offender (MDO). (Pen. Code, § 2960 et seq.)<sup>1</sup> He claims that there is no substantial evidence that he received 90 days of treatment for his severe mental disorder in the year prior to his parole. He also contends that pedophilia does not fall within the purview of the MDO law because it is not treatable or capable of remission, and that classifying pedophiles with MDOs whose disorders can be brought into remission through treatment violates the equal protection clauses of the federal and state Constitutions. We affirm.

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<sup>1</sup> All statutory references are to the Penal Code.

## FACTS

In 2000, Givens was convicted of committing lewd and lascivious acts on a 14- or 15-year-old child and sentenced to state prison. (§ 288, subd. (c)(1).) At the time, Givens also had prior convictions for lewd and lascivious acts on children under 14. (§ 288, subd. (a).) In September 2003, shortly before he was due for release from prison, appellant filed a petition challenging the determination of the Board of Prison Terms (BPT) that he qualified as an MDO.

Givens's treating psychologist, Douglas Burton, testified at trial, and written reports by psychologists Steven J. Terrini and John E. Kincaid were admitted into evidence and considered by the trial court. Drs. Burton and Terrini agreed that Givens satisfied all section 2962 requirements for commitment as an MDO. Dr. Kincaid concluded that one criteria had not been met. Specifically, Dr. Burton testified, and Drs. Terrini and Kincaid opined in written evaluations, that Givens suffered from the severe mental disorder of pedophilia (non-exclusive type), that his pedophilia was a cause or aggravating factor in the commission of the 2000 offense, that he was not in remission, and that he represented a substantial danger of physical harm to others. (§ 2962, subds. (a), (b), (d).) Dr. Burton and Dr. Terrini also concluded that Givens had received the required 90 days of treatment for pedophilia during the year prior to his scheduled parole date. (§ 2962, subd. (c).) Dr. Kincaid, however, concluded that Givens had received treatment for depression but not for pedophilia.

Dr. Burton testified that Givens had been receiving treatment for his pedophilia since the end of 2000, including 90 days during the prior year, and that the treatment involved the assessment of his disorder, the development of a treatment plan, and sex offender counseling. Dr. Burton acknowledged that Givens had been treated for symptoms consistent with depression, but concluded that such treatment was an element of treatment for pedophilia. Dr. Burton testified that depression was an "associated feature" of Givens's pedophilia "as opposed to a separate disorder," and that his treatment was conducted "directly for his pedophilic thinking and behavior." He also noted that

Givens had received antidepressant medication and agreed with Dr. Terrini that such medication constituted "pharmacologic treatment for pedophilia."

In his written evaluation, Dr. Terrini concluded that Givens had received 90 days of "psychiatric" treatment during the prior year and that his "paraphilia" had been discussed in sessions with clinical staff. Dr. Terrini also stated that Givens had received "SSRI antidepressant medications Zoloft and Paxil while in CDC" which medications have been used as pharmacologic treatment for pedophilia.

In his written evaluation, Dr. Kincaid stated that medical records "confirmed [that Givens] had received treatment for depression for more than 90 days. However, he had not received any treatment for pedophilia in the past year . . . ." Dr. Kincaid's report included no further details.

The trial court found that all the statutory criteria for an MDO commitment had been proven. The court acknowledged that the experts disagreed regarding Givens's treatment during the prior year, but concluded that Dr. Burton's analysis was thorough and persuasive.

## DISCUSSION

### *Treatment Finding Supported by Substantial Evidence*

Givens contends that there was insufficient evidence to support the necessary finding that he was "in treatment for [his] severe mental disorder for 90 days or more within the year prior to [his] parole or release." (§ 2962, subd. (c).) Givens asserts that his treatment was for depression, not his severe mental disorder. We disagree.

In reviewing the sufficiency of evidence to support a finding in an MDO proceeding, we consider the entire record to determine if reasonable and credible evidence supports the finding. (*People v. Miller* (1994) 25 Cal.App.4th 913, 919-920.) We do not reweigh the evidence or substitute our decision for that of the trier of fact. (*Ibid.*) We will uphold an order if a reasonable trier of fact could have found the commitment criteria beyond a reasonable doubt. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082.)

We conclude that substantial evidence supports the finding that Givens "has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release." (§ 2962, subd. (c).)<sup>2</sup> At the MDO hearing, Dr. Burton concluded that Givens had received 90 days of treatment for his pedophilia in the months immediately prior to his Board of Prison Terms hearing, and testified at length regarding the basis for his conclusion. Dr. Terrini reached the same conclusion in his written report. Despite a contrary conclusion by Dr. Kincaid, Dr. Burton's testimony and Dr. Terrini's written report are sufficient to support the trial court's finding.

Givens argues that the evidence shows treatment for depression but not for pedophilia. Givens asserts that neither Dr. Burton nor Dr. Terrini identified any entry in the CDC medical records unequivocally stating that Givens was treated for pedophilia, and that treatment for an associative feature of pedophilia does not constitute treatment for pedophilia.

In making these arguments, Givens improperly asks us to both reweigh the evidence and reject reasonable inferences drawn by expert witnesses from the evidence. Responding directly to Dr. Kincaid's opinion that Givens had been treated only for depression, Dr. Burton testified that Givens's treatment at CDC was based on the pattern of pedophilia that resulted in his imprisonment. Also, the assertion by Givens that treatment for a feature of pedophilia is not treatment for pedophilia lacks support in the record.

Moreover, in significant part Givens bases his argument on the medical records maintained by the CDC. Except as identified by Drs. Burton and Terrini, the CDC records were not part of the record at trial and are not part of the record on appeal.

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<sup>2</sup> An order of commitment under the MDO law requires that the prisoner has a severe mental disorder, the disorder was a cause or aggravating factor in the commission of a qualifying offense, the disorder "is not in remission, or cannot be kept in remission without treatment," the prisoner "has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release," and by reason of the disorder, the prisoner poses a serious threat of physical harm to others. (§ 2962, subds. (a)-(d)(1).)

In addition, contrary to argument by Givens, the CDC records included in the record at trial contain an express diagnosis of pedophilia in January 2001 and other entries referring to sex offender treatment.

Givens also relies on the recent case of *People v. Sheek* (2004) 122 Cal.App.4th 1606. *Sheek* affirmed the trial court's dismissal of an MDO proceeding because, in an offer of proof, the People failed to establish that the defendant had received 90 days of treatment for his pedophilia. (*Id.*, at p. 1611.) A psychiatrist testified that the defendant suffered from depression and pedophilia and, although he received no treatment for pedophilia, he received an antidepressant drug for depression and such drugs also benefit pedophiles. (*Id.*, at p. 1609.) *Sheek* concluded that the People were bootstrapping treatment for depression onto pedophilia, that no proof was offered of treatment for pedophilia, and that the defendant had not even been diagnosed with pedophilia until less than 90 days before his parole release date.

Although Givens suffers from both depression and pedophilia and was also treated with antidepressant drugs, the evidence of treatment for pedophilia in the instant case is substantially more extensive than the evidence in *Sheek*. Here, evidence shows that Givens was diagnosed with pedophilia more than two years before his parole release date, his depression was a feature of pedophilia rather than a separate disorder, and he received sex offender counseling and other treatment directed at his pedophilia.

#### *Pedophilia Satisfies MDO Criteria*

Givens contends that pedophiles do not qualify for commitment as MDOs because, although it is a serious mental disorder, pedophilia does not fit the remaining MDO criteria. Givens contends that the MDO law applies only to "treatable" mental disorders (§ 2960), and that a mental disorder is treatable only if there are treatment options available with the capability of effecting a remission of the disorder so that "the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support." (§ 2962, subd. (a).) Givens argues that pedophilia is not treatable and not capable of remission.

This court has held that pedophilia is a "severe mental disorder" within the meaning of the MDO law. (*People v. Starr* (2003) 106 Cal.App.4th 1202, 1206.) In so doing, we relied on the classification of pedophilia as a mental disorder in other statutory commitment proceedings, and the broad definition of severe mental disorder which requires only that the disorder be "an illness or disease or condition" which "grossly impairs behavior." (*Id.*, at pp. 1205-1206; § 2962, subd. (a).)

We reject Givens's position because it is inconsistent with *Starr*. Givens attempts to approach the application of MDO law to pedophilia from a different perspective but, in essence, he is asserting that pedophilia is not a severe mental disorder that permits a commitment under the MDO law.

Even if *Starr* is not dispositive, Givens's argument is unsupported in the record. The evidence does not support the conclusion that pedophilia has no overt signs or symptoms, or is not treatable, or is not capable of being placed in remission as the term "remission" is used in MDO law. The testimony and written evaluations by Drs. Burton, Terrini, and Kincaid establish the opposite, namely, that pedophilia is treatable, has overt signs and symptoms, and can be placed in remission through treatment.

Dr. Kincaid's report states that pedophilia is difficult to treat, but this is not evidence that it is untreatable. Dr. Burton testified that the absence of potential victims while Givens was incarcerated limited his display of certain symptoms, but this is not evidence that pedophilia has no overt signs or symptoms. In fact, Dr. Burton testified that Givens displayed overt signs and symptoms of pedophilia in the form of sexual fantasies and sexual behavior in response to his sexual fantasies despite being in a hospital setting without children. In addition, Dr. Kincaid's conclusion that Givens was not in remission was based on his belief that pedophilia can be placed in remission through more intensive treatment.

#### *No Equal Protection Violation*

Givens also contends that an MDO with pedophilia is denied equal protection of the law by being placed in the same classification as MDOs with severe mental disorders that can be treated and placed in remission through treatment. This

argument fails because, as we have stated, its factual basis has no support in the record. Nothing in the record indicates that pedophiles and other MDOs are not similarly situated under the MDO law. (See *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1159.)

The judgment (order of commitment) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

John A. Trice, Judge  
Superior Court County of San Luis Obispo

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